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No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Under federal law, a person who is convicted of a felony is prohibited from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. See 18 U.S.C. 925(c). Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is:

Whether, despite the appropriations provision barring ATF from acting on applications from relief from firearms disabilities, a federal district court has authority to grant such relief to a person convicted of a felony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 253 F.3d 234. The opinion of the district court (Pet. App. 12a-38a) is reported at 89 F. Supp. 2d 828.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. A petition for rehearing was denied on August 21, 2001 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on November 19, 2001, and was granted on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—18 U.S.C. 922(g)(1) and Section 925(c), and the applicable appropriations statutes—appear at Pet. App. 41a-43a.

STATEMENT

1. Under federal law, it is unlawful for any person convicted of a felony to ship or transport any firearm or ammunition in interstate or foreign commerce, to possess any firearm or ammunition in or affecting commerce, or to receive any firearm or ammunition that has been shipped or transported in commerce. 18 U.S.C. 922(g)(1). A convicted felon may apply to the Secretary of the Treasury for relief from the disabilities imposed by that prohibition. 18 U.S.C. 925(c). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* The Secretary has delegated his authority to act on applications for relief to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF). 27 C.F.R. 178.144(b) and (d). Whenever the Secretary grants relief to any person pursuant to that provision, "he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor." 18 U.S.C. 925(c).

A person whose application for relief is "denied" by the Secretary may file a petition with the federal district court for the district in which he resides "for a judicial review of such denial." 18 U.S.C. 925(c). The court may "admit additional evidence where failure to do so would result in a miscarriage of justice." *Ibid.*

The scope of judicial review in such an action is governed by the Administrative Procedure Act (APA), 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984).[1]

In 1992, the annual appropriations law for ATF provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732. In each subsequent year, Congress has permitted the use of appropriated funds to process applications for relief filed by corporations, but it has retained the bar on the use of appropriated funds to process applications for relief filed by individuals.[2]

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[1] Congress first provided an avenue for relief from firearms disabilities in 1965. Federal Firearms Act, Pub. L. No. 89-184, 79 Stat. 788. That provision was enacted after the Olin Mathieson Chemical Corporation, the parent corporation of the firearms manufacturer Winchester, was convicted of a felony. H.R. Rep. No. 708, 89th Cong., 1st Sess. 2-3 (1965). The relief provision allowed Winchester to remain in business. In 1986, Congress added the provision allowing for judicial review. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449. A decade before Congress added the judicial review provision, the Ninth Circuit had held that an applicant for relief could obtain judicial review under the APA of a denial of an application. *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976).

[2] Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 519; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319;

The Senate Report accompanying the first appropriations law explained the purposes of the bar:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992).

The House Report accompanying the fourth appropriations law reiterated those reasons for the ban:

> For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. * * * [T]hose who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

2. In March 1998, respondent and three associates attended a gun show in Laredo, Texas. Pet. App. 12a. After the show, respondent and his associates drove respondent's car to Nuevo Laredo, Mexico. *Id.* at 12a-13a. Mexican officials stopped the car at the port of entry and discovered approximately two hundred rounds of ammunition in the back of the car. *Id.* at 13a. Respondent admitted ownership of the car and the ammunition, but asserted that the ammunition had been inadvertently left in the car. *Ibid.* Respondent was convicted of importing ammunition into Mexico and sentenced to five years' imprisonment. *Ibid.*

After spending four months in a Mexican jail, respondent was transferred to the La Tuna Penitentiary in the United States, where he spent another month before being released. Pet. App. 13a. Respondent was then placed on supervised release under the jurisdiction of the United States District Court for the Eastern District of Texas. The district court terminated supervision of respondent approximately ten months later, on August 30, 1999. *Id.* at 14a.

By virtue of his felony conviction in Mexico, respondent was prohibited by 18 U.S.C. 922(g)(1) from possessing, distributing, or receiving firearms or ammunition. 27 C.F.R. 178.11 ("crime punishable" definition).[3]

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[3] There is a conflict in the circuits on whether a foreign conviction triggers firearms disabilities. Compare *United States* v. *Atkins*, 872 F.2d 94 (4th Cir.) (foreign conviction triggers firearms disabilities), cert. denied, 493 U.S. 836 (1989), and *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986) (same), with *United States* v. *Concha*, 233 F.3d 1249 (10th Cir. 2000) (foreign conviction does not trigger firearms disabilities). In this case, however, respondent conceded (C.A. Br. 18) that his conviction in Mexico triggered firearms disabilities under 18 U.S.C. 922(g)(1), and the court of appeals

Respondent applied to ATF for relief from his firearms disabilities. Pet. App. 15a. ATF informed respondent that it could not act on his application because ATF's annual appropriations law forbids it from expending any funds to investigate or act upon applications for relief from federal firearms disabilities. J.A. 33-34.

Respondent then filed suit in the United States District Court for the Eastern District of Texas. Pet. App. 12a. Relying on the judicial review provision in Section 925(c), respondent asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order granting relief from his firearms disabilities. J.A. 8-15. Respondent attached various affidavits from persons attesting to his fitness to possess firearms. J.A. 16-26.

In reliance on the Fifth Circuit's decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996), the government moved to dismiss respondent's complaint. Mot. To Dismiss at 2-3. In *McGill*, the Fifth Circuit held that the appropriations bar prevents ATF from acting on applications for relief from firearms disabilities and that a district court has no authority to consider an application for relief in the first instance. 74 F.3d at 67.

The district court denied the government's motion to dismiss. Pet. App. 12a-38a. The district court concluded that *McGill* had been incorrectly decided and declined to follow it. *Id.* at 18a-29a. Specifically, the court concluded that, while the appropriations law prevents ATF from acting on applications for relief from firearms disabilities, a court retains authority to grant such relief. *Id.* at 24a. The court also concluded that

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did not address that issue. Pet. App. 11a. That question is therefore not presented here. See Gov't Reply Pet. 1-5.

ATF's failure to act on respondent's application constituted an effective denial of his application that was subject to judicial review. *Id.* at 29a-30a. After a hearing, the court determined that respondent was not likely to act in a manner dangerous to public safety and that granting relief from firearms disabilities to him would not be contrary to the public interest. *Id.* at 34a-36a. The court then entered a judgment granting respondent relief from his firearms disabilities. *Id.* at 37a-38a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that it had held in *McGill* that the annual appropriations laws "reflected an intent to suspend the relief provided to individuals by § 925(c)." *Id.* at 4a. The court nonetheless refused to follow that decision.

The court noted that the *McGill* court had relied on the principle that Congress may amend substantive law through an appropriations statute. Pet. App. 6a-7a. In the court of appeals' view, the decisions of this Court supporting that principle are limited to the repeal of "financial right[s]." *Id.* at 7a-8a. As a ground for departing from its earlier decision in *McGill*, the court also noted that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." *Id.* at 9a. The court also deemed it significant that Congress had refused to enact a bill that would have eliminated the relief provision. *Id.* at 5a-6a. Based on those considerations, the court held that it "must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* at 9a.

The court further held that when ATF notified respondent that it would not act on his application, respondent's "administrative remedies *de facto* were exhausted," and "the trial court had jurisdiction to entertain this appeal." *Ibid.* Finally, the court held that the district court "did not err as a matter of law" in granting respondent relief from his firearms disabilities. *Id.* at 11a.

SUMMARY OF ARGUMENT

As six courts of appeals have held, a district court does not have authority to grant a convicted felon relief from his firearms disabilities. The court of appeals in this case erred in holding otherwise.

Section 925(c) authorizes the Secretary of the Treasury, through ATF, to grant a convicted felon's application for relief from firearms disabilities when it is established to the Secretary's satisfaction that the preconditions for relief have been satisfied. However, in every annual appropriations law since 1992, Congress has expressly prohibited ATF from expending any appropriated funds to investigate or act upon requests for relief from firearms disabilities. That appropriations bar suspends ATF's authority to grant relief from firearms disabilities. The reasons underlying that prohibition are clear: Congress determined that rearming convicted felons creates an unwarranted danger to the public, and that taxpayer funds and government resources should not be devoted to an inquiry so fraught with danger.

In disabling ATF from acting, Congress did not empower district courts to assume the agency's role. A district court's sole authority under Section 925(c) is to review an ATF denial of relief to determine whether it

is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. 706. Section 925(c) has never given district courts authority to remove a convicted felon's firearms disabilities based on its own independent assessment that the preconditions for relief have been satisfied and that the applicant warrants a favorable exercise of discretion.

Moreover, the appropriations bar effectively precludes a judicial award of relief from firearms disabilities. An essential predicate for judicial review under Section 925(c) is an ATF "denial" of relief. Because the appropriations bar prevents ATF from acting on applications for relief, ATF may neither grant nor deny such an application. Without an ATF "denial," a court has no authority to act under Section 925(c).

Even if ATF's failure to act on an application triggered judicial review under Section 925(c), that would simply lead to a consideration of whether ATF's failure to act on the application was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ATF's compliance with a statutory directive not to use its resources to process applications for relief is none of those things.

Allowing district courts to grant relief from firearms disabilities to convicted felons would also create the very dangers that Congress sought to avert by imposing a bar on the use of appropriated funds by ATF. District courts are not in a position to undertake the sort of investigations that would be required to determine whether an applicant's firearms disabilities should be removed, and they have no greater ability than ATF to ensure that felons who have their firearms privileges restored will not pose an unacceptable risk to the public.

ARGUMENT

A DISTRICT COURT DOES NOT HAVE AUTHORITY TO GRANT A CONVICTED FELON RELIEF FROM FEDERAL FIREARMS DISABILITIES

The Fifth Circuit in this case held that a district court has authority to grant relief from federal firearms disabilities to persons who have been convicted of a felony. That holding is incorrect. As six courts of appeals have concluded, ATF's annual appropriations law prevents ATF from acting on applications for such relief, and a district court does not have authority to assume the responsibility that Congress removed from ATF. *Pontarelli* v. *United States*, No. 00-1268, 2002 WL 480107, at *6 (3d Cir. Mar. 29, 2002) (en banc) (overruling *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995)); *Mullis* v. *United States*, 230 F.3d 215, 219-221 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53, 57-61 (2d Cir. 2000); *Saccacio* v. *ATF*, 211 F.3d 102, 104-105 (4th Cir. 2000); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997); *Burtch* v. *United States Dep't of the Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997).

A. ATF's Appropriations Law Suspends ATF's Authority To Act On Applications For Relief From Firearms Disabilities

Section 922(g)(1) of Title 18 makes it unlawful for any person convicted of a felony to transport, possess, or receive firearms or ammunition. Congress's purpose in enacting that provision was "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). Congress's constitutional authority to enact that prohibition is well established. See *Lewis* v. *United States*, 445 U.S. 55, 65-66 & n.8 (1980).

In 18 U.S.C. 925(c), Congress authorized the Secretary of the Treasury, acting through ATF, to grant convicted felons relief from their firearms disabilities when "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." In every ATF appropriations statute passed since 1992, however, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 106 Stat. 1732; 107 Stat. 1228; 108 Stat. 2385; 109 Stat. 471; 110 Stat. 3009-319; 111 Stat. 1277; 112 Stat. 2681-485; 113 Stat. 434; 114 Stat. 2763A-129; 115 Stat. 519. That appropriations bar has the effect of suspending the Secretary's authority under Section 925(c) to grant to convicted felons relief from their firearms disabilities.

This Court has repeatedly held that Congress has authority under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940); *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). In *Robertson*, the Court explained that "although repeals by implication are especially disfavored in the appropriations context, * * * Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." 503 U.S. at 440. Similarly in *Will*, the Court stated that "when Congress desires to suspend or repeal a statute in force, 'there can be no doubt that * * * it could accomplish

its purpose by an amendment to an appropriation bill, or otherwise.'" 449 U.S. at 222. "The whole question depends on the intention of Congress as expressed in the statutes." *Ibid.*

Congress could not have expressed more clearly its intent to suspend ATF's authority to grant relief from firearms disabilities under 18 U.S.C. 925(c). The appropriations bar expressly prevents ATF from using appropriated funds to investigate or act on applications from relief. Thus, "while the annual appropriations statutes speak in terms of the ATF's ability to spend appropriated funds, their effect on the agency is obvious: It may neither grant nor deny applications falling within the scope of the funding restriction." *McHugh*, 220 F.3d at 58.[4]

The legislative history of the appropriations bar confirms that Congress intended to suspend ATF's authority to act on applications for relief from firearms disabilities. See *Dickerson*, 310 U.S. at 561. The legislative history reveals that Congress enacted that prohibition because it concluded that determining whether to grant relief "is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made," and because it believed that the government's scarce resources "would be better utilized to crack down on

[4] ATF may not use fees collected from applicants or any other source to process applications for relief from firearms disabilities. Under 31 U.S.C. 3302(b), any funds collected in the form of fees would have to be deposited in the Treasury, and under the Appropriations Clause of the Constitution (Article I, Section 9, Clause 7) and the Anti-Deficiency Act (31 U.S.C. 1341), money may not be drawn from the Treasury unless it has been appropriated by an Act of Congress. See *OPM* v. *Richmond*, 496 U.S. 414 (1990). Gov't Reply Pet. 8.

violent crime." S. Rep. No. 353, *supra*, at 19-20. The bar in each annual appropriations law thus reflects Congress's considered judgment that "those who commit felonies should not be allowed to have their right to own a firearm restored." H.R. Rep. No. 183, *supra*, at 15.[5]

Thus, while the relief provision in 18 U.S.C. 925(c) has not itself been repealed, Congress has deliberately and unequivocally suspended the Executive's ability to implement it. Until such time as Congress removes the statutory restriction, ATF is legally prohibited from using its resources to process applications for relief from firearms disabilities. As the Second Circuit concluded in *McHugh*, "Congress could not have stated more clearly that the ATF is prohibited from acting on applications submitted by individuals pursuant to § 925(c)." 220 F.3d at 58. Accord, *e.g.*, *Mullis*, 230 F.3d

[5] See also H.R. Rep. No. 618, 102d Cong., 2d Sess. 14 (1992) ("After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety." The resources spent on investigations therefore "would be better utilized by ATF in fighting violent crime."); 138 Cong. Rec. 24,490 (1992) (Sen. Chafee) ("Dozens of convicted felons who have had their gun rights reinstated have been rearrested on new charges, including attempted murder, robbery, and child molestation. * * * At a time when gun violence is exacting terrible costs upon our society, it seems absolutely crystal clear to me that the government's time and money would be far better spent trying to keep guns out of the hands of convicted felons, not helping them regain access to firearms."); *id.* at 24,494 (Sen. Lautenberg) ("Criminals granted relief have later been rearrested for crimes ranging from attempted murder to rape and kidnaping. * * * ATF agents have better things to do than conduct in-depth investigations on behalf of convicted felons.").

at 221; *Owen*, 122 F.3d at 1353; *Burtch*, 120 F.3d at 1090.

B. Section 925(c) Has Never Authorized District Courts To Remove A Convicted Felon's Firearms Disabilities Based On Its Own Independent Assessment That The Preconditions For Relief Have Been Satisfied And Relief Is Warranted

Congress did not suspend ATF's authority to provide relief from firearms disabilities only to have district courts assume the agency's role. Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary of the Treasury to determine whether a convicted felon's application for relief should be granted: Under Section 925(c), relief from firearms disabilities could be granted if it was established to the *Secretary's* satisfaction that the statutory preconditions for relief were satisfied. 18 U.S.C. 925(c). Those preconditions were not only that the applicant would not be likely to act in a manner dangerous to public safety, but also that the granting of relief "would not be contrary to the public interest." *Ibid.* Those preconditions, moreover, limited the Secretary's authority to grant relief, not to deny it. *Bowen* v. *Yuckett*, 482 U.S. 137, 148 (1987). Even when the Secretary was satisfied that the preconditions for relief were met, Section 925(c) provided only that the Secretary "may" grant relief, not that he was required to do so, *ibid.*; accord 27 C.F.R. 178.144(d), and it "impos[e]d no limitations on the factors that [he] [could] consider in determining who, among the class of eligible [applicants], should be granted relief." Cf. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

Section 925(c) has never assigned any comparable authority to the district courts. It does not provide that

relief may be granted to a convicted felon when it is established "to the court's satisfaction" that the statutory prerequisites for relief have been satisfied. Nor does it give courts authority to determine what the "public interest" entails under Section 925(c), to decide when the granting of relief under that Section would be consistent with the public interest, or to make policy judgments concerning who among the class of eligible persons should be granted relief.

Instead, courts play a far more limited role under Section 925(c). A person "whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. 925(c). Under Section 925(c), a district court is therefore "a court of review, not one of first view." *Oklahoma Tax Comm'n* v. *Chicasaw Nation*, 515 U.S. 450, 457 (1995). Section 925(c), like other statutory review provisions, incorporates the standards for judicial review set forth in the Administrative Procedure Act, see *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987), including the rule that a court ordinarily may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-414 (1971); S. Rep. No. 583, *supra*, at 26-27; *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 425 (7th Cir. 1996); *Bradley* v. *ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984). Under that standard, a court considers only "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. It may not "substitute its judgment for that of the agency." *Ibid.*;

see also *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (under the APA, "[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"). Moreover, "[i]n applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

Thus, from the beginning, Section 925(c) allocated to the Secretary the authority to decide whether to grant a convicted felon's request for relief from firearms disabilities, and allocated to the courts the more limited role of determining whether the Secretary's denials of relief are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A district court has never had any freestanding authority under Section 925(c) to determine independently and in the first instance that a convicted felon has satisfied the prerequisites for relief from his firearms disabilities and should be granted such relief as a matter of discretion. That division of responsibility between ATF and the courts reflects Congress's judgment that "[a]dministrative agencies are far better suited than are courts to make determinations based on the broad policy question of what is in the 'public interest.'" *McHugh*, 220 F.3d at 59.

When Congress suspended the Secretary's authority under Section 925(c) to grant convicted felons relief from firearms disabilities, it did not invest district courts with any new authority. Thus, just as before the enactment of the annual appropriation statutes, district courts possess only the authority to determine whether the Secretary's exercise of the *Secretary's* discretion

respecting an application for relief is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. They have no authority to construct a record from scratch and to assess independently whether the preconditions for relief from firearms disabilities have been satisfied—much less to decide, if the preconditions for relief have been satisfied, whether to grant relief as a matter of discretion. In exercising that authority in this case, the district court assumed a role that courts have never had under Section 925(c).

C. The Appropriations Bar Effectively Precludes A Court From Awarding A Convicted Felon Relief From Firearms Disabilities

1. The appropriations bar not only precludes ATF from "investigat[ing] and act[ing] upon" an application for relief; it also effectively precludes a court from entering a judgment that relieves a convicted felon of his firearms disabilities. Judicial review is available under Section 925(c) only when ATF issues a "denial" of an application. In the context of Section 925(c), the meaning of a "denial" is "an adverse determination on the merits." *Burtch*, 120 F.3d at 1090; *Saccacio*, 211 F.3d at 104; *Pontarelli*, 2002 WL 480107, at *7. Because of the appropriations law, ATF no longer has authority to "deny" applications for relief under Section 925(c). Indeed, the appropriations law forbids ATF from taking *any action* on applications for relief: it may neither grant nor deny them. The appropriations law therefore not only suspends ATF's authority to act on applications for relief, it simultaneously removes any basis for obtaining the essential predicate for judicial review—an ATF "denial" of an application. Without an ATF denial, there is no role for the judiciary to play under Section 925(c).

That barrier to judicial action under Section 925(c) may not be circumvented by characterizing ATF's failure to act on an application as a "denial" of relief. The APA expressly distinguishes between agency action that takes the form of a "denial" of "relief" and agency action that takes the form of a "failure to act." 5 U.S.C. 551(13). Because Section 925(c) authorizes judicial review only when there has been an ATF denial of relief, and not when there has been a failure to act, "[t]he federal district courts are no more empowered [under Section 925(c)] than is the ATF to review individuals' applications for relief from federal firearms disabilities." *McHugh*, 220 F.3d at 59; see *Pontarelli*, 2002 WL 480107, at *7 ("an inability to grant a request is not commonly understood to constitute a 'denial'"); *Webster's Third New International Dictionary* 602 (3d ed. 1993) (defining "denial" as a "refusal to grant, assent to, or sanction," or a "rejection of something requested, claimed, or felt to be due"). Cf. *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (declining to equate a "*refusal* to make a determination," with a "final determination").

The APA does generally authorize judicial review of final agency action that takes the form of a "failure to act" when there is no other adequate remedy in a court. 5 U.S.C. 551(13), 704. But respondent sought judicial review under Section 925(c), not under the provision of the APA authorizing review of an agency's failure to act. Respondent's decision not to seek review of ATF's failure to act under the APA is understandable. The remedy for an impermissible failure to act is a judicial order "compell[ing] agency action," not de novo judicial action as respondent sought. 5 U.S.C. 706(1). Moreover, the APA authorizes relief for a failure to act only when agency action is "unlawfully withheld or unreasonably delayed." *Ibid.* "Given Congress's explicit instruction that the ATF should not spend any appropriated funds to process applications for the removal of firearm disabilities, [an applicant] could hardly argue that the ATF has acted unlawfully or unreasonably in failing to process his application." *Mullis*, 230 F.3d at 219; cf. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 386 (1980) (agency documents are not "*improperly* withheld" within the meaning of the Freedom of Information Act when the agency has been subject to a district court injunction barring disclosure).

2. Even if ATF's failure to act on an application were treated as a "denial" of relief, that would simply lead to an inquiry into whether the "denial" was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "ATF's decision to comply with a congressional directive cannot be said to meet this standard." *McHugh*, 220 F.3d at 61. To the contrary, if ATF had proceeded to decide respondent's application on the merits, it would have *violated* its duty to act "in accordance with law." Thus, if a court had authority to review ATF's failure to act on an application for relief from firearms disabilities under Section 925(c), the court would be required to sustain ATF's refusal to act on the ground that the refusal was required by the applicable appropriations law. A court could not condemn ATF's failure to act as unlawful, much less make its own independent determination that an applicant should be relieved of his firearms disabilities.

3. The district court's limited authority under Section 925(c) to "admit additional evidence where failure to do so would result in a miscarriage of justice" does not detract from that conclusion. The authority to admit "additional" evidence assumes that there is al-

ready evidence in an administrative record compiled by the agency, and thus merely permits a district court "to supplement the record," not "to create the record in the first place." *Pontarelli*, 2002 WL 480107, at *6. The appropriations laws, however, bar the agency from conducting the "investigat[ion]" necessary to develop the evidence for an administrative record. Moreover, a court's authority to admit "additional" evidence may be exercised only when the failure to do so would result "in a miscarriage of justice." That constraint on the admission of evidence further "suggests that the initial adjudication of applications is limited to the Secretary of the Treasury." *McHugh*, 220 F.3d at 59.

In any event, the authority to admit additional evidence exists as a component of a statutory scheme that makes an ATF "denial" of relief a precondition to judicial review, and limits judicial authority to determining whether such a denial is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). Thus, the district court's authority to admit "additional" evidence may be exercised only in connection with judicial review of an ATF "denial," and then only for the purpose of assisting the court in deciding whether such a denial is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A court may not use that authority to build a record from scratch for the purpose of determining independently whether an application for relief should be granted. See S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984) (stating that in a case calling for the admission of additional evidence, "the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of

the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination.").

D. Judicial Consideration Of Applications For Relief From Firearms Disabilities Would Defeat The Purposes Of The Appropriations Bar

A court's assumption of authority to grant convicted felons relief from their firearms disabilities would also be inconsistent with Congress's reasons for suspending ATF's authority. Congress barred ATF from granting such relief because it believed that ATF could easily make mistakes that could have terrible consequences for innocent members of the public and because it believed that taxpayer money should not be spent on a task that is so fraught with danger. See pp. 4, 12-13 & note 5, *supra*. Those concerns are not diminished by shifting responsibility for decisions from ATF to federal district courts.

Before making a decision on whether to grant a convicted felon relief from firearms disabilities, ATF conducted a thorough investigation. It interviewed the applicant, his references, probation officer, employers, neighbors, and friends. *Pontarelli*, 2002 WL 480107, at *11. Indeed, before Congress enacted the funding restriction in 1992, ATF spent "approximately 40 man-years" annually to investigate and act upon applications filed pursuant to Section 925(c). S. Rep. No. 353, *supra*, at 19-20. Notwithstanding that intensive effort, Congress feared that there was still too great a risk that ATF would mistakenly remove firearms disabilities from persons who would pose a danger to the public.

There is no reason to expect that judicial proceedings could reduce that risk. If anything, judicial proceedings

would be less suited to guard against the risk that mistakes will be made, with potentially devastating consequences. As the Sixth Circuit explained in *Mullis*, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. Rather than conducting a thorough background investigation, a district court must necessarily rely largely on the information that the parties furnish. The applicant would typically supply the district court "only with contacts who will supply positive information concerning the applicant's record and reputation." *Ibid.* At the same time, the appropriations law prevents ATF from conducting an investigation that could counter the evidence that the applicant presents. As a consequence, "the court would only be able to conduct a very one sided inquiry, relying largely on letters of recommendation and testimony from individuals hand selected by an applicant." *Id.* at 219-220. That process is particularly ill-suited to protecting the public from the dangers that Congress sought to avert. At the very least, it would not provide any greater protection against the risks associated with granting relief than the ATF investigations that Congress deemed inadequate.

Nor would shifting responsibility from ATF to the courts allay Congress's concern that continued processing of applications for relief from firearms disabilities consumes taxpayer money and diverts government resources that would be better spent on law enforcement. In the context of the 1996 version of the appropriations bar, Senator Simon, a sponsor of the original appropriations bar, made that very point. He explained that, if courts assumed ATF's role in processing applications for relief, "[i]nstead of wasting

taxpayer money and the time of ATF agents, which could be much better spent on important law enforcement efforts * * *, we would now be wasting court resources and distracting the courts from consideration of serious criminal cases." 142 Cong. Rec. 27,066 (1996). He further emphasized that the goal of the appropriations bar "has always been to prohibit convicted felons from getting their guns back—whether through ATF or the courts. It was never our intention to shift the burden to the courts." *Ibid.*

Thus, a court's assumption of authority to provide relief from firearms disabilities cannot be reconciled with Congress's decision to suspend ATF's authority to grant such relief. As the Tenth Circuit concluded in *Owen*, "[t]o infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements." 122 F.3d at 1354.

E. Congress's Restoration Of ATF's Authority To Remove The Firearms Disabilities Of Corporations Confirms That Courts Lack Authority To Remove The Firearms Disabilities Of Individuals

The history of Congress's funding for investigating and acting upon corporate applications for relief from firearms disabilities confirms that courts do not have authority to act upon applications for relief filed by individuals. The initial appropriations bar prohibited ATF from investigating or acting upon any applications for relief from firearms disabilities. In the very next annual appropriations law, Congress provided funding for ATF to investigate and act upon applications filed by corporations, but continued to withhold funding for investigating or acting upon applications filed by indivi-

duals. Every subsequent appropriation has maintained that distinction. See p.3 & note 2, *supra*.

If the original appropriations bar had simply shifted responsibility for processing applications from ATF to the courts, there would have been no reason for Congress to restore ATF's authority to investigate and act upon applications for relief filed by corporations. The only explanation for that restoration of authority is that Congress intended for corporations, but not individuals, to have the opportunity to have their firearms privileges restored. *Pontarelli*, 2002 WL 481017, at *7.

F. The Court Of Appeals' Reasoning Is Unpersuasive

The Fifth Circuit gave several reasons for concluding that a court has authority to grant convicted felons relief from their firearms disabilities. None is persuasive.

1. While acknowledging that cases such as *Will* and *Dickerson* establish that Congress may suspend the operation of a federal statute through an appropriations law, the court of appeals sought to distinguish those cases on the ground that they involved the repeal of "financial" rights. Pet. App. 7a-8a. But those cases announced a categorical rule that Congress may suspend the operations of a statute through an appropriations law. *Will*, 449 U.S. at 222; *Dickerson*, 310 U.S. at 555. They did not purport to limit that principle to appropriations laws that affect financial rights. *Ibid.* Moreover, in *Robertson*, the Court applied the principle that Congress may suspend or amend a statute through an appropriations law in a context that did not involve financial rights. In that case, the Court held that a provision in an appropriations law effectively amended a federal environmental statute. *Robertson*, 503 U.S. at 440. There is therefore no basis for the court of appeals'

view that Congress may only affect financial rights through an appropriations bill.

2. The Fifth Circuit deemed it significant that Congress had reenacted the ATF appropriations bar several times, "with the resulting reality of the effective non-temporary suspension of statutorily created rights." Pet. App. 9a. Under this Court's controlling precedents, however, the question whether the operation of substantive law is suspended by passage of an appropriations law is one of legislative intent. *Will*, 449 U.S. at 222; see pp. 11-12, *supra*. Here, it is abundantly clear that Congress intended through each annual appropriations law to suspend the operation of Section 925(c). The number of appropriations statutes does nothing to detract from that inference. To the contrary, the accumulation of the appropriations bars only makes congressional intent to suspend the operation of Section 925(c) all the more emphatic. See *Dickerson*, 310 U.S. at 561.

Moreover, under Section 925(c), convicted felons have never had a "right[]" (Pet. App. 9a) to have their firearms disabilities removed. Instead, prior to its suspension, Section 925(c) granted to the Secretary a discretionary power to lift the firearms bar, and to do so only if it was established, to the *Secretary's* satisfaction, that an applicant would not be likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest. There is every reason to give full effect to an explicit statutory restriction on the exercise of such a discretionary authority by an Executive Branch official.

3. The court of appeals also viewed it as significant (Pet. App. 6a, 9a) that the Congress that enacted the first of the annual appropriations bars failed to enact the Stop Arming Felons Act (SAFE), a bill that would

have eliminated the relief provision altogether. See 138 Cong. Rec. 4184 (1992). But failed legislative proposals are almost always an unreliable basis for discerning Congress's intent in enacting a different bill. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167 (1994). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 170 (2001). Congress may well have failed to pass the SAFE bill because it preferred to address the merits of permitting felons to apply for removal of firearms disabilities annually, rather than resolving the issue on a more permanent basis. *Pontarelli*, 2002 WL 480107, at *10. Congress may also have been concerned about the SAFE bill's provision barring felons convicted under state law from possessing firearms even when the States in which they were convicted restored their civil rights. *Ibid.* The reason that Congress failed to enact SAFE, however, is ultimately unknowable. That is why Congress's intent must be derived from the laws that Congress enacted, and not from bills that it did not enact. Here, the laws that Congress has enacted—Section 925(c) and each annual appropriations law—reveal that Congress intended to preclude ATF from granting relief from firearms disabilities, and that it did not intend for the courts to assume the agency's role.

4. Finally, the court of appeals observed that respondent had exhausted his administrative remedies. See Pet. App. 9a & n.20. However, respondent's exhaustion of administrative remedies simply begs the question whether, following such exhaustion, the district court had authority to determine independently that respondent was entitled to relief from his firearms

disabilities. As discussed above, the court had no such authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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